

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

3 THE UNITED STATES OF AMERICA,)
4 ex rel.)
5 JULIE LONG,) Civil Action
6 Plaintiffs) No. 16-12182-FDS
7 vs.)
8 JANSSEN BIOTECH, INC.,)
Defendant

10 BEFORE: MAGISTRATE JUDGE PAGE M. KELLEY

MOTION HEARING CONDUCTED BY ZOOM

15 John Joseph Moakley United States Courthouse
16 1 Courthouse Way
Boston, MA 02210

18 | January 23, 2022
11:00 a.m.

1 APPEARANCES VIA ZOOM:

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8 For the Defendant:

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PROCEEDINGS

2 THE COURT: Okay, good morning, everyone.

3 MR. LEOPOLD: Good morning, Judge, nice to see you.

4 Happy New Year.

5 MR. PRESTON: Good morning, your Honor.

6 THE COURT: Same to you. We'll let Mr. Lovett call
7 the case.

8 THE CLERK: The court is on record in the matter of
9 United States of America ex rel. vs. Janssen Biotech. Inc.
10 Would counsel identify themselves for the record.

11 MR. LEOPOLD: Good morning, your Honor, again,
12 Ted Leopold, along with my partners, Casey Preston and
13 Poorad Razavi and Gary Azorsky.

14 THE COURT: Good morning.

15 MR. POSNER: Good morning, your Honor, this is
16 Ethan Posner, good to see you again. I'm joined by
17 Kristen Cobb who will be arguing our motions today,
18 Jason Raofield has joined our team, I think some of our
19 other colleagues are on as well. Good morning.

20 THE COURT: Great. Good morning. Good morning,
21 Ms. Cobb and everyone else.

22 MS. COBB: Good morning, your Honor.

23 MR. RAOFIELD: Good morning, your Honor.

24 THE COURT: All right. So we have quite a lot of
25 ground to cover here. There's three motions that have been

1 referred by Chief Judge Saylor, Number 328, Number 333,
2 Number 345, and I guess I'm just going to start off with a
3 question to you, Ms. Cobb. I'm here to hear your argument
4 however you want to make it, but I'm just baffled that you
5 can't get better information and more definite information
6 about these personnel, who supposedly you ought to know
7 about, I think, so that the names that you've given are so
8 tentative, and, you know, I don't think the language that
9 you've chosen may have information about the relevant
10 information and it's unsworn to and that type of thing.

11 To me, it does look like you're hiding the ball, so
12 I'm wondering what you did precisely to come up with these
13 names and why doesn't the company have better records?

14 MS. COBB: So, your Honor, we are not hiding the
15 ball in any way. I think, you know, we did an extensive
16 investigation, we reviewed thousands of documents, we looked
17 at organizational charts, and we provided relator with the
18 names of about 50 people that to the best of our knowledge
19 had significant involvement in these programs, and I was
20 personally involved in this investigation, and it took
21 probably hundreds of hours, but until we actually review
22 their documents, you know, it's not like we can say this
23 person definitively had significant involvement, but of the
24 people we provided to relator, those are the people that had
25 involvement in these programs that we think would have the

1 most significant information related to these programs, and
2 so we were in no way trying to hide the ball, we were in no
3 way concealing information, we really did take this
4 seriously, and we did a reasonable investigation, and these
5 are the individuals that we've come up with.

6 It is 40 programs over 25 years, so to say that
7 maybe Janssen hasn't kept the best records while we're going
8 back to, you know, 1998, 1999, it's over a significant
9 period of time, so we don't know what else we could do to
10 provide any more or better information. These are the
11 people.

12 This is the information that we have, and we may
13 have couched language as in these people may have
14 significant involvement because until we've collected their
15 documents and reviewed their documents, you know, we can't
16 say with 100 percent certainty.

17 THE COURT: So what's wrong with having you do
18 that, collect their documents, review them and then certify
19 that these are the people with the heaviest responsibility
20 and the most responsibility that you've been able to find?

21 MS. COBB: I think we would be willing to do that,
22 but your order didn't require that, your order required that
23 we come up with a process for sampling the documents in the
24 first instance to see, so we were proceeding under the
25 instructions in your order which were that we would do a

1 reasonable investigation, we would come up with these
2 individuals and then the parties would confer on a way to
3 sample those documents and then produce, you know,
4 responsive documents from those people, and so we haven't
5 gotten to that second part yet of conferring on a process
6 for sampling the documents.

7 THE COURT: Okay. Let me just ask you,
8 Mr. Leopold, giving the benefit of the doubt to defendant
9 here, what would be your view of actually, my order may not
10 have been the greatest, but actually looking at the
11 documents that turn up with these various I think it's
12 actually 29 people that they've newly identified and then
13 seeing if you're satisfied that they are the ones with
14 enough responsibility that they're of use to you?

15 MR. LEOPOLD: So, your Honor, first of all, I would
16 say that your order was very good and quite clear on what
17 the duties and obligations of the parties were, and, as your
18 Honor knows by I'm sure at this point in time after the
19 hearings have been canceled I think once and has read the
20 papers, this is not the only issue where we are alleging the
21 failure of Janssen to comply with many issues of the Court's
22 order.

23 The thing that I have quite a lot of concern about
24 here is this is one of the core issues in the case. They
25 have given 29 various names. Of course, if we were to go

1 out and say we want to depose all 29 of these individuals,
2 you could imagine the, you know, multiple protective orders
3 that the defendant would say were fishing expedition and
4 everything else. The obligation at this point is for the
5 defendant to identify the substantial individuals that were
6 involved.

7 Now, I have a hard time understanding how they have
8 not yet looked at the documents to formulate that conclusion
9 as to key people that were approving these programs, which
10 is the core issue of this litigation. We are now multiple
11 years into this litigation. Every time an issue like this
12 comes up, the Court enters an order, we have to go back
13 because they don't comply with it, it's months and months of
14 more delay and delay and delay, and we're not further along
15 because they obviate the Court's order, and it's enough.

16 I respectfully say it's enough. We need the core
17 individuals that are responsible, whether they look through
18 the documents or maybe they ask some people who were there,
19 who were formerly there, maybe they go to the general
20 counsel's office and ask who was involved, but to say with
21 all due respect, we're this far down the road, they haven't
22 looked at the documents yet who exactly is the core
23 individuals to respond to the Court's order.

24 I find it hard to understand, respectfully, and I
25 would ask the Court that within two weeks they provide those

1 names, look through the documents, get as many people as
2 they need to look through the documents and talk to people
3 and give us the core people so that we can take the
4 deposition.

5 And as Mr. Preston can talk, they've moved for a
6 protective order on the 30(b) (6), where, okay, you don't
7 want to go look at the documents, you don't want to give us
8 names, we're going to take a 30(b) (6) deposition and we're
9 trying to get it from you, no, no, no, you can't do that, a
10 protective order. Another six months delay by the time the
11 briefing is done, we get a hearing, that's what's going on.

12 We're entitled to get the information of the core
13 people who were involved and the Court respectfully should
14 again order it within two weeks and no more nonsense of all
15 this. It's getting old.

16 THE COURT: So I hear you, and I understand your
17 frustration and I'm happy to hear from Mr. Preston, too, but
18 I'm just wondering rather than asking them again to do the
19 same thing, which they say, well, we did it, it makes sense
20 in spite of the trouble it might even be faster, which I
21 agree with you, I would like to really get things moving
22 here, maybe for you to sample these people to look at their
23 documents and maybe depose a certain number of them with the
24 idea that if you uncover more information, then you can act
25 on that because I just don't know the value of repeatedly

1 asking them to do something, when as Ms. Cobb said, they did
2 it and this is what they came up with.

3 MR. LEOPOLD: Well, they didn't fully respectfully,
4 in my view, comply fully with the Court's order. It was not
5 only just to provide the name but provide the names in good
6 faith which, means doing due diligence and looking at
7 documents and things of that sort, which they clearly
8 haven't done.

9 It doesn't take a rocket scientist to say, okay,
10 give us all the names of the people involved, we're not
11 going to look at the documents, we're just going to give
12 them the names, so that's what happened here. If they want
13 to say within one week give us all the documents that go to
14 these individuals, whatever these documents are, whether
15 employment files, reviews, whatever it is about them, give
16 it to us within a week and we'll plow through it and then
17 we'll be able to identify the core individuals.

18 What I don't want to happen, which is the game that
19 is going on here, with all due respect, we've all been doing
20 this a long time, is we're going to get to trial, and
21 there's going to be like 25 people. We're still not going
22 to know who the core people are, we're not going to be able
23 to call anybody, and all of a sudden, in their case they're
24 going to call the core person or people in their defense,
25 and that's the game of gotcha that is not fair, and that's

1 why we have discovery.

2 So give us all the documents, don't hold any
3 document back, privilege or anything else, by Friday of this
4 week and we'll get through the documents and then we'll take
5 the depositions, and then when we take the depositions and
6 we find out that they were either not truthful or the
7 documents are relevant or whatever, we're going to come back
8 to the Court respectfully and move for appropriate sanctions
9 if that's the game they want to play, but if they don't want
10 to go through the documents on their own, give us the
11 documents, we'll get through them and we'll start taking the
12 depositions. We can't even get to the point of taking
13 depositions yet.

14 MS. COBB: Your Honor, can I respond?

15 THE COURT: Yes, go right ahead, Ms. Cobb.

16 MS. COBB: So, first of all, I don't think we're
17 playing any games. We've produced well over 3 million pages
18 of documents. To say that they don't know who the people
19 are, that we're going to show up at trial with some witness
20 they've never heard of is just kind of impossible at this
21 point given the amount of information that we've given them.

22 Second of all, we're not going to produce privilege
23 information, and we're not just going to hand over documents
24 without reviewing them. That's not how discovery works, but
25 I also think there's like a little bit disconnect of how

1 documents work.

2 To review documents from 50 individuals who haven't
3 been named as custodians prior to them being named as
4 custodian is simply not how discovery works. Discovery
5 works, you name custodians, you review the custodial files,
6 you review company files, but to tell you Janssen needs to
7 take on the burden of just reviewing 50 individual documents
8 before they'll pick custodians doesn't necessarily comport
9 with how discovery is contemplated under the Federal Rules.

10 Now, if the court would like us to sample these
11 documents and give them information about, you know, these
12 individuals or if we sample them and review them and come up
13 with a different list of people or identify another
14 individual, maybe that happens, but at the end of the day,
15 to say we just have to produce all this information without
16 reviewing it and give them privileged information, that's
17 just not how discovery works.

18 MR. LEOPOLD: Your Honor, if I could say one thing
19 because I think -- just to be crystal clear, they've given
20 us approximately 25 to 29 names, so our options are to take
21 every one of those individual depositions who are the
22 relevant and substantial individuals.

23 If we did that, we would need a Court Order because
24 we're only limited to I think 10, 12 depositions, so we're a
25 little bit on a catch 22, right, because if we noticed them

1 all, they would object saying it's too many, you're outside
2 the Court's order, okay, fine. We're going to do a 30(b) (6)
3 and ask the person with knowledge based on their
4 investigation, whatever they do before the deposition, no,
5 we can't do that, there's a protective order that's been
6 filed. So, you know what is -- what are our alternatives,
7 what is the game going on?

8 THE COURT: So I don't know that the 30(b) (6)
9 deposition is really your best option here because of the
10 things that the defendant has said in its briefing about how
11 they would just have them read these names into the record.

12 I guess you would be able to ask them what did they
13 do to come up with the names, and I guess it would be
14 certified, it would be under oath, which you don't have this
15 information under oath.

16 I mean, it just looks like there's so much distrust
17 and suspicion, and I don't know that defendant has really
18 been as transparent as you should have been to quell these
19 suspicions, like why isn't this certified, why don't you --
20 why are you couching it in such tentative terms? What did
21 you do, like if you didn't look at any of their documents
22 and you don't know really who they are, how can you put
23 their names forward?

24 MS. COBB: So --

25 THE COURT: Those are the kind of questions that

1 come to mind.

2 MS. COBB: So we reviewed thousands of documents
3 when we did this, and the people that show up, we didn't
4 pull the custodial file let's say of Joe Smith and looked at
5 his individual custodial file, but he is on documents that
6 have already been produced in this case, so we have reviewed
7 tons of documents.

8 We have not pulled his individual e-mail and gone
9 through it, but we've reviewed, you know, all of the PRC
10 records, and what I can say is they want to know the people
11 that were involved in developing the programs, right. Well,
12 every single one of these programs went through PRC. The
13 person who submitted it to the PRC, the marketing person is
14 named own that PRC form, and that's the person that was
15 responsible for the program in the marketing division for
16 developing the content, for working whatever third parties.

17 Information has been produced, and that's the type
18 of information we're talking about when we say we didn't
19 look at their individual e-mails but we looked at other
20 e-mails, we looked at other company documents, we looked at
21 PRC forms. We did a very extensive investigation.

22 And, you know, Mr. Leopold keeps saying they're
23 going to have to take 29 depositions. Well, this is what
24 happens in every litigation. You have to pick custodians.
25 You don't get to get every single custodian that may have

1 information. You have to make strategic decisions and pick
2 the people you think that you would like their documents
3 from.

4 And over a year ago, they filed a brief that
5 included dozens of potential custodians that they wanted
6 documents from, and so now to say they don't have any
7 information about who had significant involvement, well,
8 they should know, too. We've produced documents. The
9 relator in this case worked at Janssen for 16 years. They
10 themselves have reviewed all of the information that we've
11 produced.

12 We've given them letters. Like if they want a
13 sworn statement, if that's what is really tieing this up, I
14 think we would be amenable to, you know, putting these names
15 and supplemental interrogatory responses, like I don't think
16 there's an issue about the veracity or the truthfulness of
17 these individuals names.

18 And we're, you know, if that's really the issue is
19 that it's just not a sworn statement, we're happy to do
20 something to cure that issue.

21 THE COURT: So I guess I would also like to see you
22 say that these are the only names you know of and that
23 you're not holding anyone back.

24 MS. COBB: Absolutely. These are the only people
25 we know of. We are not holding any names back, and we've

1 been transparent that we may discover in some document that,
2 oh, maybe this person did rise to the level of significance
3 involvement, you know, there is sort of this isn't a black
4 and white situation where it's like, yes, this person had
5 significant involvement and this person didn't.

6 Right now based on information we've reviewed,
7 we've made some judgment calls as to who was significantly
8 involved and who was just tangentially involved, but there
9 comes a time, you know, once we start reviewing these
10 documents and producing documents that we discover an
11 additional person rises to the level of being significantly
12 involved, and at that time we'd be happy to, you know,
13 inform relator and produce those people's documents as well.

14 We are really, really not trying to make this
15 difficult, and we are really trying to do the best we can.

16 MR. PRESTON: Your Honor, I think there is
17 something being overlooked here. Janssen has never made its
18 initial disclosures. It's asserted 38 affirmative offenses.

19 THE COURT: Okay. I would like to get -- but I
20 first want to get you, I would like -- I would really want
21 to get to that subject, Mr. Preston, because I know you've
22 really emphasized that in your briefs, but I'm interested in
23 figuring out how can we get you reliable, thorough
24 information about these 29 people and whether you would like
25 to select them as your custodians, and I understand this is

1 a related issue.

2 They need to make initial disclosures fully before
3 you can do that, too, but I'm just wondering if they do a
4 supplemental interrogatory answer that is certified and that
5 gives you detailed information about, as you have been
6 asking about how the person's documents are stored and what,
7 why does Janssen think that person is significant, you know,
8 what, as Ms. Cobb, just so nicely explained, is it that they
9 were the one who presented the program to the committee or
10 what and give you some assurance that if new people do come
11 up in the course of discovery that I would entertain you
12 allowing to -- I would entertain allowing you to add those
13 people.

14 I'm trying to work out some compromise to get you
15 moving on that. So I don't know if those kind of things
16 would satisfy you.

17 MR. PRESTON: We appreciate that, your Honor, and
18 that is definitely a first step, but I, again, the main
19 issue in this case, your Honor, is Janssen's knowledge of
20 the unlawfulness of these services. That is a core element
21 of the anti-kickback claim, and Janssen is asserting as an
22 affirmative defense that it reviewed the law and that it
23 believed it was acting lawfully, and those are the key
24 witnesses.

25 There is nowhere, Ms. Cobb can't point to a single

1 document where Janssen has actually said these are the
2 witnesses and these are the documents that we are relying
3 upon in asserting this defense and these are the key
4 witnesses of the case, and they asserted this defense two
5 years ago, your Honor, so for them to act like, oh, we need
6 to review more documents, these are the key witnesses, and
7 some of them may very well be attorneys, but they need to be
8 identified.

9 And this isn't something where there should be
10 further investigation. If they asserted these defenses,
11 they were required to assert them in good faith. They
12 certified that they believed these defenses were accurate,
13 so what's the basis for them? Those are the key witnesses.

14 MR. LEOPOLD: And that's why we have drilled down
15 on the three primary affirmative defenses at this point in
16 time because it's based upon what they have written as there
17 are core people that supported this defense.

18 Is it 29 people that were involved? I highly doubt
19 it. Are we going to have to take 29 depositions to prove
20 that or they should know their affirmative defense that has
21 been on the record for years now, when they made it, as
22 Casey said, somebody in good faith wrote it down and said,
23 here, guys, outside lawyers, this is our affirmative
24 defense, these people were involved.

25 Who are those people? I've never been involved in

1 a case three years down the road where they can't identify
2 those core individuals that support their affirmative
3 defense.

4 MS. COBB: Your Honor --

5 MR. LEOPOLD: Withdraw it if it's not a defense.

6 MS. COBB: Your Honor --

7 THE COURT: Ms. Cobb, you can respond.

8 MS. COBB: We have provided them with the
9 identities of the individuals involved in the review of the
10 programs at issue, including the legal and healthcare
11 compliance personnel. This demand stems from relator's
12 improper assertion that they're entitled to examine the
13 advice Janssen received from its attorneys concerning the
14 legality or illegality of the programs. They're not
15 entitled to that. Judge Saylor has already decided this
16 issue when he reviewed the on the advice of counsel motion.

17 THE COURT: Sure. Can I just ask you, are those
18 the people who are listed in your answers to Interrogatory
19 Number 20?

20 MS. COBB: Yes.

21 THE COURT: Okay. So those are the people that
22 you're relying on?

23 MS. COBB: Yes, those are the people. It seems to
24 go far beyond just those people. They want the information.
25 They think they're entitled to the legal, like to review the

1 legal advice and the documents. We're not waiving
2 privilege, so they aren't entitled to that. We will produce
3 nonprivileged responsive information about the illegality or
4 legality of the programs, but to the extent they're asking
5 for privileged information, we said we're not waiving
6 privilege, we're not asserting the advice of counsel
7 defense, and so they're not entitled to that information.

8 THE COURT: I guess I can let them argue
9 themselves, but I guess their request at this stage is they
10 want your -- the names of people, not necessarily their
11 discovery.

12 MS. COBB: And we gave them the names. Those are
13 all the names we have, it's the legal individuals and the
14 healthcare compliance personnel.

15 MR. LEOPOLD: So if I understand correctly, the 29
16 names are those people in some way, shape or form were
17 involved that goes to the affirmative defense, and if that's
18 the case, I agree with your Honor, we're not there
19 determining work product or attorney-client client
20 communications or whatever, those names, so I guess one
21 thing that we're going to need to ask the Court, perhaps do
22 it ore tenus now, we need leave of court to take all of
23 those individual's depositions to find out who knows what.

24 MS. COBB: I think there might be a little bit of a
25 discrepancy here. If they're only talking about they want

1 the individuals involved in the analysis of the legality or
2 the illegality, we provided them with those individuals'
3 names, but your order required us to provide information
4 about individuals with significant involvement in the
5 development, in the review, dissemination, all aspects of
6 the program, not just the legality or illegality of the
7 program, so I guess are we only focusing on that or we
8 focusing on the entire process of the program for
9 significant involvement?

10 THE COURT: So here's my feeling at this stage. I
11 understand that the relator thinks that the answer to
12 Interrogatory Number 20 is insufficient and that you don't
13 want to choose people off the list of 29 if they're not the
14 relevant people for the affirmative defenses; is that
15 correct, Mr. Preston? Have I said that properly?

16 MR. PRESTON: Yes, your Honor, I think when you
17 read their response to the interrogatory and the fact that
18 they haven't made any initial disclosures, it's unclear.
19 They do not explicitly state, there's not one person that
20 they explicitly state this is the person we're relying upon
21 who provided us the legal analysis, the legal advice that we
22 adopted in believing that we were acting lawfully. They
23 haven't done that, so they need to explicitly identify those
24 individuals. They need to explicitly identify the basis for
25 the defense, and, Ms. Cobb, she mischaracterizes

1 Judge Saylor's decision, which related to an entirely
2 separate issue.

3 It hasn't been decided whether Janssen can assert
4 this good faith belief that it acted lawfully and at the
5 same time withholding legal advice that it received that
6 would disprove that assertion.

7 Judge Saylor --

8 THE COURT: I agree with you that he did not
9 squarely -- that was not squarely presented to him, and he
10 did not squarely rule on it either, however, you haven't
11 either. It's not for me either at this stage, so, I mean,
12 if you want me to order Janssen to go ahead and formally set
13 out its initial disclosures on this, not just in an answer
14 to interrogatory, then I can do that.

15 MR. PRESTON: Yes, your Honor, again, we are not
16 asking for a ruling by the Court as to a waiver, but we
17 can't even bring that issue before the Court until we know
18 what the actual basis for their defense is, and they're
19 engaging in gamesmanship and stonewalling on this. They've
20 been doing it for years, so, yes, if we have the actual
21 basis for the defenses, who they're relying upon, if they're
22 asserting that the advice is privileged, then we need a
23 privilege log, and we need to know who the counsel was that
24 provided that advice, and then whether there's been a waiver
25 and we can address that issue with the Court.

1 THE COURT: So I have a slightly different view
2 than you do. I think, I think before ordering them to give
3 you discovery on who every counsel who gave them advice over
4 all these years, their names, and to come up with a
5 privilege log that I think it would be more efficient for
6 the Court to first decide if they'd waive the privilege, if,
7 in fact, because we do know from what Judge Saylor said,
8 just because they're raising a good faith defense does not
9 mean they've automatically waived the privilege, and I know
10 you have that nice *Honig* case, however you pronounce that,
11 but I don't really think that issue has been teed up at this
12 stage. I mean, maybe it's time.

13 My understanding from reading the transcript of
14 what Mr. Posner said to Chief Judge Saylor, they're not
15 raising that defense. They're not raising the advice of
16 counsel defense, so I think it's going to be, you know, a
17 pretty fine point whether they waive the attorney-client
18 privilege, Judge, by raising the good faith defense.

19 MR. PRESTON: Your Honor, I don't know how they're
20 going to pull this off. I mean, they're trying to juggle
21 this defense that they believe they were acting lawfully and
22 at the same time not relying upon advice of counsel, so I
23 guess they were relying upon nonlawyer's advice regarding
24 the anti-kickback statute and whether they were complying
25 with it, but until they're forced to actually specify the

1 basis for their defense, then how do we come to the Court
2 and argue that there's been a waiver?

3 THE COURT: Okay. So let me, Judge, ask you,
4 Ms. Cobb, how about doing that? How about giving the
5 relator a little more detail as if it is, I mean, I don't
6 know that you did this in your initial disclosures but to go
7 ahead and provide the information as to an initial
8 disclosure as to how you're going to prove up your defenses?

9 MS. COBB: Yes, we would be willing to do that.

10 THE COURT: So just regarding what we've done so
11 far, I'm inclined to ask the parties to sit down again, I
12 know it may not prove to be very fruitful, about these 29
13 witnesses and to work out how the supplemental interrogatory
14 ought to be worded, and the type of evidence that the
15 discovery that's going to go with each witness I do think
16 needs to be sampled and vetted, and I do think that Janssen
17 needs to tell relator what kind of evidence, how the
18 discovery is stored, as they're asking, because otherwise
19 they're just selecting someone in the dark, and it could be
20 like in the original list of 29, someone has 10 documents,
21 which, of course, is not going to be very helpful.

22 MS. COBB: Your Honor, that's fine. I do have one
23 issue to raise. In terms of an interrogatory, relator, you
24 know, I think you've reviewed their 30(b)(6) notice, and I
25 worry that they're going to, you know, propound an

1 interrogatory that requires that level of detail that they
2 were seeking in the 30(b) (6) notice.

3 It's virtually impossible to provide that kind of
4 detail for 40 programs going back over 25 years. They want
5 to know every single person that was involved in the
6 program, what dates they were involved, what years they were
7 involved.

8 Like some of these programs lasted many, many
9 years, and many, many people were involved in it, and so I
10 feel we're like in a catch-22 situation where no matter
11 information we give them, they will be back in front of the
12 Court saying it's not sufficient, when we are really trying
13 our best here.

14 It's just a lot of information, a lot of people
15 over 25 years, and so I don't know if there's a way to, you
16 know, limit the type of information that they need to
17 receive in order to be able to pick their custodians but to
18 simply say you need to give us every single piece of
19 information about every program and every person that was
20 involved before we can pick our custodians, what's the point
21 of discovery then? We're just basically doing the discovery
22 for them.

23 THE COURT: Okay. Let me ask Mr. Preston, let's
24 assume that there are some problems with their
25 recordkeeping, suspend disbelief for a minute and assume

1 that's true, how could you in conferring with them figure
2 out if their search for these people was adequate?

3 MR. PRESTON: Your Honor, I think that --

4 THE COURT: What reassurances would you need that
5 they had actually made a good faith effort?

6 MR. PRESTON: Let's take a step back. There was,
7 you know, Ms. Cobb, our requests asked for individuals with
8 significant involvement. We're not asking for every single
9 person who was involved. We made that clear, and your Honor
10 has helped us sort of craft this standard for what documents
11 need to be produced, and it's clear to us following your
12 Honor's order last February where it instructed Janssen that
13 it didn't do an adequate search, it didn't comply with the
14 Federal Rules, and it has an obligation to go out and
15 determine which employees had significant involvement, and
16 then a year later now, they still haven't done that.

17 Yeah, they added some names, but they're saying
18 they might have some involvement. So I'm not sure Janssen
19 is -- I feel like we need to take a deposition because all
20 we're getting is information from counsel rather than
21 information from Janssen itself, and Janssen's counsel has
22 demonstrated that it really is not doing a thorough
23 investigation if we're still two years into the case and
24 they can't specifically provide individuals and identify
25 what their role was, including the individuals that support

1 their own defenses.

2 THE COURT: So who would you propose deposing?

3 MR. PRESTON: The individuals at Janssen that
4 Janssen's counsel has been working with to interview people
5 to determine who had significant involvement. I'm not sure
6 how it's burdensome to take a 30(b)(6) deposition of the
7 individual who has been helping counsel put together their
8 witness list.

9 THE COURT: Okay. Ms. Cobb, in the interest of
10 assuaging the kind of very fundamental skepticism of relator
11 about your efforts, what about having a deposition, a
12 limited deposition, 30(b)(6) of whoever has been assisting
13 you in figuring out who had significant involvement in how
14 those names were derived, and whether there's any better way
15 to do it?

16 MS. COBB: To be honest, I think we'll be back here
17 in two months and they'll be arguing that the witness wasn't
18 sufficiently prepared because we've given them the
19 information we had. This is the information we've gathered
20 from the company. This is the information we have. So I
21 don't think they're going to get any different information
22 in a 30(b)(6).

23 I do think your suggestion that we look at the
24 documents and do some sort of sampling would be more
25 efficient than preparing a witness to answer questions

1 because it's not just going to be about -- if you look at
2 their notice, it's not just about the identification of the
3 witnesses involved, it goes way beyond that.

4 It goes into the years these people worked there,
5 what exactly they worked on, what programs they were
6 involved in, and I don't think a 30(b) (6) witness can retain
7 that much information. You know, I just don't think that's
8 possible.

9 THE COURT: So I hear your complaint that the
10 requested information, that is, who had significant
11 involvement in these programs over many years is a tough
12 question to answer, but I'm worried that, in fact, in order
13 to answer it accurately, you actually have to know these
14 very specific things, such as how long was the person there
15 and what exactly --

16 MS. COBB: We gave them that information. We gave
17 them all of that information for the people that we've
18 identified. We gave them their role, we gave them how many
19 years -- I mean, many of these people still work at Janssen,
20 no longer in a relevant role, but we gave them the years
21 they were in the relevant role, we gave them their titles,
22 and we know from our investigation that those are the people
23 that were involved in developing the programs and on sitting
24 on the PRC, the people that reviewed it, the healthcare
25 compliance people that reviewed it.

1 We've given them all that information, and we
2 produced documents that support all of that information.
3 We've cited to documents that we ruled on in our various
4 correspondence, we've produced work charts going back to
5 2002 to substantiate why we chose people.

6 I really don't know that there's anything more we
7 can do. It's literally these are the people, these are the
8 people who were involved in the programs. We're not hiding
9 the ball, and we're willing to do whatever it takes, but I
10 don't think they're going to get any more information from a
11 30 (b) (6).

12 I do think that would be a waste of time and
13 burdensome. I think we would like to move forward, and
14 we're just not willing to, you know, I mean, we're willing
15 to do whatever the Court wants, but the amount of skepticism
16 they have without any real proof that we're lying about
17 anything or hiding things or concealing things is sometimes
18 frustrating.

19 MR. PRESTON: I don't think, respectfully, nobody
20 is saying anybody is, quote, "lying," whatever. The issue
21 is just getting the information that we need in order to not
22 be prejudiced in putting our case forward, and what I'm
23 hearing is there's 29 or so names that the defendant feels
24 are people that were involved, how many of them were
25 significantly involved, as your Honor has ordered them to

1 provide. It sounds like their view is all these people were
2 involved, and, therefore, all had significant involvement,
3 and if that's the case, we need their documents.

4 I don't think -- respectfully, Judge, to go back
5 and for the parties to keep talking about these issues, it
6 always end up as a stalemate, and we're just back here, you
7 know, three months later or six months later with delays.

8 If that's the case, let us take --

9 THE COURT: What's your proposal then?

10 MR. PRESTON: As much as I don't want to do it, we
11 need the documents that go to these individuals, and we need
12 leave of court to take as many of these depositions as we
13 feel is necessary. And we're going to have to take every
14 one of them. Probably many will be very short, but at the
15 end of the day, we'll find out of these 29, so we're not
16 going to be prejudiced at trial, what they did, who they
17 are, who they spoke with, what did they say, and if somebody
18 says attorney-client privilege, we'll have to deal with that
19 at some point later.

20 It's not the most efficient way because I highly
21 doubt 29 people were involved that made, you know, the legal
22 decision, although now it's not lawyers evidently, somebody
23 made the decisions that these programs were appropriate.

24 It's one or more of these 29 people, probably a handful of
25 them, maybe less, maybe none of them, but that's what we

1 need, and we shouldn't. I just know what's going to happen
2 without a Court Order, they're going to say no way you're
3 going to take all these depositions.

4 THE COURT: I don't know it's necessary for you to
5 take 29 depositions especially if you can see the documents
6 and then choose which ones are going to be your --

7 MS. COBB: Your Honor.

8 THE COURT: Yes.

9 MS. COBB: Your Honor, I think we are -- we want to
10 move discovery forward, we want to start reviewing
11 documents. We have no more documents to review. We're sort
12 of in a stalemate.

13 We, I think, would be willing, if they wanted to
14 pick 12 of the 29 people, you know, we can maybe discuss,
15 you know, providing them with information on search term
16 hits for these people so they can get a sense of how much
17 did these people have, but, you know, they can pick 12
18 people, and then we can deal with the rest as the
19 significant involvement people, but, you know, outside of
20 those people 12 people, if they really think another person
21 should be added as a custodian, I think we'd be willing to
22 add a few of these additional custodians, if some of these
23 remaining of the 29 people turn out to be more significant,
24 but I do think there's a way to move this forward without
25 them needing to take depositions, without them needing to

1 like, you know, I do think we just want to start getting
2 them information, and there should be at least some people
3 they know of the 29 that they want documents for so they
4 should start picking some custodians and we can start
5 reviewing those documents.

6 MR. PRESTON: Your Honor, your orders last
7 February were that Janssen is obligated to produce documents
8 from individuals that had significant involvement in the key
9 facets of the kickback scheme, and then in addition to that,
10 relator was able to choose 12 additional ESI custodians.
11 Now Janssen is trying to go back and limit the witnesses
12 from whom it has to search and produce documents and limit
13 it to 12 custodians.

14 This is the problem, right, if Janssen is aware of
15 documents that are relevant that exist, they need to be
16 produced whether or not that person is identified as a
17 custodian.

18 And the fact that they're acting like, well, we
19 don't know who has relevant documents until we review the
20 documents themselves, that's not the way discovery is to
21 take place. Janssen has an obligation to go and investigate
22 which employees had significant involvement and who holds
23 relevant documents that need to be produced.

24 THE COURT: Okay. So I think I've heard enough on
25 this. I'll just take it under advisement and issue

1 something. If I issue an order that the parties agree
2 should be tweaked in some way, I'm happy for you to agree on
3 that, but I'll do my best on this.

4 So let's move on. I know there's a lot of other
5 issues in docket 328, protective orders that Janssen is
6 seeking. Ms. Cobb.

7 MS. COBB: Yes, so I think there's a few more
8 issues. I think we've discussed the storage of employee's
9 documents. I don't necessarily think that is required,
10 Janssen is required to do that under the Federal Rules
11 unless there's evidence we've engaged in bad faith or
12 unlawfully withheld documents. Relator hasn't presented any
13 such evidence, so I think we've already sort of discussed
14 that issue though.

15 THE COURT: Okay. Can I just ask you, Ms. Cobb, my
16 sense of this is that part of the information they're
17 looking for is how much trouble will it be to retrieve
18 employee's documents and how many documents there would be
19 for an employee if someone's relatively not so important,
20 vis-à-vis enough person, they wouldn't choose that person,
21 so I think my take on this is that a yes for relator on this
22 issue would just help them to make a choice about who they
23 want to pick as a custodian. Do you agree with that?

24 MS. COBB: Yeah, I mean, if you're saying we should
25 provide them with information about how much data we have

1 for each employee, each of these 29 individuals, I think
2 that will, you know, it depends on also what search terms
3 we're running. If we're -- you know, this goes back to the
4 original order, and, you know, they'll have 12 custodians
5 that seemingly get all of the search terms run but then
6 there was these significant involvement employees that we
7 were supposed to agree on, you know, some sort of limited
8 set of search terms, so if we're talking about running just
9 all of the search terms on all 29 people, then I think that
10 might provide some clarity about who was significantly
11 involved based on hits that are returned for those people,
12 but that could also be somewhat misleading because there
13 could be someone that was only in a relevant role for a year
14 but they were the most important person in that role and so
15 they don't have that many documents because it was for a
16 short period of time, so this is why we're having a hard
17 time saying definitively these are the people with
18 significant involvement because, you know, someone could
19 have been involved for only six months but they were the
20 main person on a program for six months but someone else was
21 involved for five years, you know, so it is not just a very
22 simple question that's answered.

23 THE COURT: Okay. Anything else you want to
24 highlight? I have read this, and I will go through it when
25 I'm writing my order.

1 MS. COBB: Yeah, I think the two other most
2 important issues that we raised were the identification of
3 the roles of the nonlegal personnel on the privilege log
4 and, you know, we acknowledge that the court ordered Janssen
5 to do this, however at the time that we briefed that issue,
6 which addressed many, many issues, we hadn't analyzed the
7 number of individuals on the log, and after doing so there
8 are well over 700 people.

9 To put that in context of the over 700 people, only
10 25 people appeared 10 or more times and 562 are only listed
11 one time, and this would be a pretty burdensome process to
12 go through and try and identify the roles and the years of
13 all of these people when that's not necessary for analyzing
14 privilege.

15 Privilege is based on substance of a communication,
16 not the role a person held who is cc'd on a communication,
17 so, you know, and also they get three legal custodians. We
18 are in the process, we're almost done reviewing the
19 documents from the legal custodian, and we're about to
20 produce a new privilege log to them, and so the number of
21 people is only going to continue expanding.

22 THE COURT: So I guess the problem is if a lawyer
23 is e-mailing, even if it seems like legal advice but they're
24 e-mailing with people who they don't have a privilege,
25 they're not in that privilege circle or whatever you call

1 it, then it's not privileged, so I guess what you're looking
2 for in a review is are these people within that circle of
3 need to know and seeking or getting legal advice even if the
4 communication itself from your vantage point of having
5 somebody review it for you, even if it looks like legal
6 individuals, if the person is not a client and you can
7 really break that circle if you include a few people that
8 shouldn't have gotten it, so I think that's the problem.

9 Let me ask you, Mr. Preston, I know you don't want
10 to have the responsibility foisted on you for figuring out
11 which e-mails you think are questionable, but anything you
12 can say about maybe picking out certain e-mails that seem
13 questionable to you?

14 MR. PRESTON: Well, your Honor, I think that
15 they're trying to shift the burden to us and really the
16 Court because we're going to ask, we're going to have to ask
17 for an in-camera review of many of these documents and this
18 is a case --

19 THE COURT: I don't mind doing an in-camera review,
20 but I hear you that you shouldn't have to figure out who
21 those 700 people are either.

22 I mean, I'm just curious why are there 500 plus
23 people listed once, is it like a secretary or a paralegal?

24 MS. COBB: Yes, there's, I mean, Janssen has
25 hundreds of thousands of employees. Like, you know, there

1 is privileged communications that go all the time to certain
2 departments which could be hundreds of people, and it's, you
3 know, this is legal advice like, you know, within the
4 company, and so there are certain communications that have a
5 lot of people in them because it's a large company.

6 MR. PRESTON: Your Honor, I think you struck it,
7 the nail on the head earlier, just because it's an e-mail or
8 a correspondence from an attorney doesn't mean that it's
9 privileged if it's not being sent to individuals where it's
10 actually for purposes of providing legal advice and it's
11 intended to be confidential, and when you're copying
12 numerous people on an e-mail, then there's serious questions
13 as to whether that was intended to be confidential.

14 The other fact of this case is Janssen had
15 significant relationships with outside consultants that
16 provided these services that helped them develop these
17 services that are at issue, and so many of these
18 correspondence likely were shared with people outside the
19 company.

20 There would be no privilege there, but unless we
21 know who that individual is, what their role was, and
22 whether they even worked for Janssen, we have no way of
23 assessing whether they claimed privilege is accurate.

24 THE COURT: So with the consultant issue, I don't
25 know if you're correct about that. I mean, it seems to me

1 if you have a consultant providing these services, it could
2 very well be that you would want to pass onto them legal
3 restrictions and things. As they're developing the program,
4 they need to keep in mind they can't violate certain tenets.

5 MR. PRESTON: It's possible, you may be right, but
6 that's the whole reason why we need this information so we
7 can assess whether these communications are, in fact,
8 privileged legal advice.

9 THE COURT: So how many e-mails have been up
10 designated as privileged? How many entries do we have on
11 the privilege log?

12 MS. COBB: I am not sure about that, but, like I
13 said, we've been in the process of preparing an updated
14 privilege log, a supplemental log, and so it's going to be
15 in a matter of weeks, it will be significantly more because
16 this will include all of the communications from one of the
17 legal custodians that they've chosen.

18 THE COURT: And, Mr. Preston, is it your position
19 that this is already these issues or is it just you're
20 waiting on this privilege log and you anticipate this being
21 an issue? Do you already have a privilege log?

22 MR. PRESTON: I'm not sure I understand what issue
23 you're referencing, your Honor.

24 THE COURT: Do you already have a privilege log
25 where you don't know who the participants in the

1 conversations are?

2 MR. PRESTON: We have a privilege log that hasn't
3 been updated for a year, despite numerous productions, but
4 that earlier privilege log which your Honor made a ruling
5 last February that they should disclose the roles of the
6 individuals on the privilege log, yes, that contains
7 numerous communications where we question whether the
8 communication contained confidential legal advice based on
9 large number of people who were copied on those
10 communications.

11 THE COURT: So that was like a nine-page document,
12 right, that privilege log, as I recall?

13 MR. PRESTON: Approximately, Yes, your Honor.

14 THE COURT: And I do admit it was little bitty
15 lines, so there were a lot of entries, but it's still only
16 nine pages. If it were a small number -- I don't know what
17 I'm going to rule on this, but I just don't know what to
18 say. I hear Janssen there's 700 people who they or may not
19 be able to identify. I just don't know what to say.

20 MR. LEOPOLD: Your Honor, as I'm hearing all this,
21 the bottom line is your Honor ordered this a year ago and
22 now we're still here arguing the same issue.

23 THE COURT: I know I did, but I don't think Janssen
24 knew at the time, nor did I, that this would be this type of
25 issue.

1 MR. LEOPOLD: No, I understand that, but the core
2 issue is why do we have to amongst ourselves outside the
3 Court keep addressing this issue, get nowhere, and now we're
4 here a year later? Shouldn't Janssen have come back a long
5 time ago and said all of this instead of meandering the
6 issue around instead of following the Court's order? I
7 mean, nothing we could do about it now, but the issue is
8 okay, we hear the issue, you know, within two weeks, not
9 weeks from when a privilege log will be up and ready to go.

10 Somebody has got to put the foot to the pedal and
11 get it to us. It's been over a year since it's been
12 ordered. When are we going to get it? That's the first
13 issue. Then we can all look at it and decide which of those
14 issues need to come before the Court or the parties could
15 talk further or whatever.

16 THE COURT: I think you're getting the privilege
17 log shortly. Ms. Cobb, do you know when that's going out?

18 MS. COBB: It should be, I don't want to give a
19 certain date, but it should be either the last week of
20 January or the first week of February.

21 THE COURT: Okay.

22 MS. COBB: And we suggested to relator at the
23 beginning of this process if they had certain entries that
24 they were more concerned about, we would be willing to look
25 at those, but to just have to provide them with a list of

1 750, I think it's actually 845 people are on the list. We
2 gave them all the legal personnel that are listed on the
3 log. Like we have tried to work with them on this, and
4 they're just unwilling to compromise, and there's only going
5 to be more names. The next log we serve them, it might have
6 1,000 names, it might have 1200 names. I mean, it is a real
7 big undertaking.

8 THE COURT: Well, I understand. I mean, the
9 balancing consideration here really is, I think some of this
10 information, if it isn't privileged is really, really
11 important to relator, and, for example, if there are outside
12 consultants that are being given legal advice, then that's
13 something that they might want to litigate, and so just sort
14 of leaving them in the dark is problematic.

15 Have you only identified legal personnel and no one
16 else?

17 MS. COBB: Yeah, that we provided to relator, yes.

18 THE COURT: It does seem kind of crazy not to know
19 anyone.

20 MS. COBB: We know people, but, you know, like of
21 the 25 people that appear 10 or more times, it's like
22 Karen Trahan, they're custodians in this case. We, of
23 course, know who those people are, we know their roles.
24 Mr. Preston and Mr. Leopold also know those people and know
25 their roles. When you get down to numbers 600, I'm sure,

1 you know, I'm not going to say I'm sure we could figure it
2 out because some of those people may have worked at Janssen
3 2003, 2004, you know, we may not have information for every
4 single person on the log, just because the log goes back so
5 long. And, you know, we don't know if those people worked
6 at Janssen for a long time. Janssen migrated HR systems a
7 number of times.

8 This isn't -- I think Mr. Preston and Mr. Leopold
9 think there's some Google type search we can do and it pops
10 up, information for every single one of these people.
11 That's not necessarily the case.

12 THE COURT: I haven't looked at the privilege log
13 in a long time. The privilege log, does it give the names
14 and e-mail addresses of all of the parents to a certain
15 e-mail?

16 MS. COBB: It's the names, yes.

17 THE COURT: But not their e-mail addresses?

18 MS. COBB: I don't believe the e-mail addresses are
19 on them, no.

20 THE COURT: Because that might go a long way toward
21 identifying if someone works for Janssen or if someone works
22 for some outside consultant rather than just the names, but
23 I don't want to mess up the delivery of the privilege log
24 either. I don't want another big delay because I'm ordering
25 you to change the way you're doing your log.

1 Okay. So I think the first I would say, as quickly
2 as you can get the privilege log to relators, the privilege
3 logs that you're preparing now, and I'm going to take this
4 under advisement right now.

5 I mean, there has to be some way, some work-around
6 this so we can know who these people are. I don't know that
7 you making list 800 some odd people and their precise role
8 in the company especially, if they might have been there a
9 shorter time is really that critical, but I do think -- I
10 don't know, maybe the e-mail addresses Mr. Leopold or
11 Mr. Preston would help you sort through this.

12 MR. PRESTON: Your Honor, I think that would be
13 helpful to have e-mail addresses, and, you know, that will
14 help us identify people at least that were outside the
15 company that were being provided this purported legal
16 advice.

17 MS. COBB: We're amenable to doing that. We can
18 pull that information. I'm not in charge of preparing the
19 privilege log, so I cannot say whether or not it will delay
20 or significantly delay, but I don't think it would be so
21 significant. It might push it back a week or so, but I
22 don't think it would cause, you know, a massive delay.

23 MR. PRESTON: I think, your Honor, with that
24 information and with information of disclosing who in these
25 communications were lawyers and then with giving us the

1 ability to go back to Janssen for those entries in the log,
2 that either there's a large number of individuals who were
3 copied on that purported legal advice, I think those are the
4 ones where we're concerned is that really considered to be
5 confidential legal advice when it's disseminated to such a
6 large number of people?

7 THE COURT: Sure. And I do think there's a sort of
8 need to know rule if you're distributing something
9 company-wide, it can lose its privilege nature, so I hear
10 you on that.

11 MR. LEOPOLD: Or outside the company.

12 THE COURT: Outside the company, for sure, although
13 I'm thinking of a *Crane* decision, that is C-r-a-n-e, where
14 Crane had -- I think it was Crane -- had engaged some kind
15 of financial firm to give them financial advice, and I found
16 that that was privileged because you just need in a business
17 context, you just need to share privileged information with
18 them so you can consult with them, but, I mean, it's a
19 complicated issue, and I understand that you're waiting for
20 the privilege logs and you intend to comb through them and
21 make sure there's not some discoverable information in
22 there, and I do think we've got to help you do that, you're
23 entitled to do that, and so I don't want to hamper you in
24 doing that.

25 I do just also want to say while I'm thinking of

1 it, Ms. Cobb, that you know, Judge -- my memory of the
2 transcript where Judge Saylor was having the conversation
3 with Mr. Posner about your client raising an advice of
4 counsel defense, Mr. Posner was saying in kind of a
5 tentative way that you hadn't decided to yet, and if I
6 remember correctly, Judge Saylor basically said, well, you
7 better make up your mind, so you do want to be careful when
8 you're making this disclosure that I'm going to order
9 that that is actually your defense and that is your complete
10 defense because you're in control of that information, and
11 you've had a long time now to figure that out, so and I
12 understand the relator is frustrated about that, but you'll
13 make your decision however best you think you should, but
14 you may not be able to revise it down the road.

15 Okay. So I'm worried that we're not making that
16 much progress here. Could we talk for a minute about the
17 time limitations on the communications with the government?

18 MS. COBB: Yes.

19 THE COURT: Because I thought the relator did a
20 pretty good job pointing out that that was -- I know
21 Judge Saylor's order, if you sort of read it literally, ends
22 everything at 2020, but I'm not sure he was thinking about
23 this particular category of discovery, and I just don't
24 know, I don't think it would be hard for you to come up with
25 it. I don't think it's burdensome, I do think it's

1 relevant, and I just wonder what's your best argument on
2 that, Ms. Cobb?

3 MS. COBB: Well, it's not only that Judge Saylor
4 cut off discovery at February 2020, but in his previous
5 ruling on this, he ordered us to produce communications with
6 DOJ, he did not order us to produce communications of HHS
7 OIG, and we don't have any communications with Medicare at
8 this point, so it's not only that we believe it should be
9 cut off at February 2020, given Judge Saylor's ruling on
10 this, but we also think we're not required to produce
11 communications with HSS OIG, and we've otherwise complied
12 with the order, and just on Friday, we produced all our
13 communications with DOJ through February 2020, so, you know,
14 I think that looking at Judge Saylor's orders on this issue
15 that it's our interpretation that it should be cut off at
16 February 2020.

17 MR. POSNER: Your Honor, this is Ethan Posner.
18 Sorry, remind me again, I may have forgotten, I'm not sure
19 I've seen a Court Order discovery about communications with
20 the government years after the relator left and after the
21 complaint was filed, just remind me again, if you would, the
22 court's view as to why that's relevant.

23 THE COURT: So I just think that as you're
24 communicating with the government, as the case goes on, as
25 this case goes on and you continue to communicate with the

1 government about this case, I don't know why there should be
2 a cutoff as to when you disclose that, like why would
3 something you communicated with the government in
4 February 2020 be so much less relevant than something you
5 communicated with them about in March 2020, I mean, so much
6 more relevant, excuse me, I said that incorrectly, and I
7 don't know that that discovery issue concerning your
8 communications with the government is the same as the
9 discovery issues about your generally providing discovery to
10 relator in the case.

11 MR. POSNER: Okay, I guess I'd ask you need to rule
12 on this now, I guess I'd ask for some leeway if your Honor
13 thinks that's relevant. Obviously we have discovery
14 requests to the government that are pending, and, of course,
15 we have discovery requests to the relator relating to its
16 communications with the government that are pending. We'd
17 obviously ask when we bring these issues up that your Honor
18 give us some leeway on that, given your Honor's ruling here.

19 THE COURT: So you mean if I order you to provide
20 that to relator that relator has to reciprocate?

21 MR. POSNER: Well, I mean, you know if our
22 communications with the government are relevant in your
23 Honor's view, not, I mean, this is years after the conduct,
24 then, yeah, obviously the relator's communications with the
25 government not only after but during the relevant time

1 period and certainly other government communications are
2 going to be relevant, too.

3 MR. LEOPOLD: That's fine, but we're not talking
4 years after the litigation, we're talking, you know, a year
5 and a half, two years since this litigation has been pending
6 and the defendant has continuously endeavored to extend
7 things, talk with, subpoena with the government, other
8 governmental entities regarding these issues, and they're
9 continuing to do it up until this day, so it's all relevant.
10 It doesn't matter that it's post February 20th, it's all
11 relevant your Honor has said, and if Mr. Posner wants to
12 serve us, or if he has, we'll respond accordingly and
13 appropriately to the discovery. We're not saying we're not
14 going to respond or whatever, but, you know, there's
15 no -- there's no line in the sand that, you know, Janssen
16 says February 20th is the date.

17 This is all manufactured by them. We want the
18 discovery as it should be, all the way through and
19 continuing, and they're continuing to go after the
20 government, subpoena the government. That's great, they can
21 do whatever they want, but they shouldn't say, ah-huh, you
22 don't get to see it. It's in the middle of litigation right
23 now.

24 THE COURT: Okay.

25 MR. PRESTON: Your Honor, if I just may, I think

1 Ms. Cobb tried to sort of draw a distinction communications
2 with OIG and SMS and DOJ. Well, any communications with any
3 of the government agencies related to this action are
4 relevant, and they're relevant for the same reasons that the
5 communications with the DOJ are relevant, so it's, you know,
6 there's no reason to allow them to withhold their
7 communications with OIG and SMS to whom they have issued
8 subpoenas, to whom they have had communications concerning
9 what they consider to be the merit of the claims, and this
10 is all happening ex-parte.

11 We represent, you know, this case is being brought
12 on behalf of the United States, I shouldn't say we represent
13 the United States, this case is being brought on behalf of
14 the United States, who is the real party in interest, and
15 we're entitled to know what communications are going on, and
16 we shouldn't have to subpoena this information from the
17 United States, shouldn't have to be burdened with that, it
18 should come from Janssen, and we're entitled to that
19 information.

20 THE COURT: Okay. Okay. So, what else? Let me
21 ask you, Ms. Cobb.

22 MS. COBB: I think there's one other issue, and
23 it's relator's request for documents located in the offices
24 or data systems of any outside counsel that Janssen has used
25 in the last 25 years.

1 THE COURT: So, let me just ask you with regard to
2 Akin Gump, were they actually giving you legal advice, or
3 were they consulting?

4 MS. COBB: No, Akin was restrained by Janssen, you
5 know, as legal counsel, outside legal counsel.

6 THE COURT: So what about their providing
7 nonprivileged seminars to doctors that Janssen paid them
8 for? That's not privileged, right?

9 MS. COBB: No, we produced the information that we
10 have about those seminars.

11 THE COURT: So I think do they want the contracts,
12 is that the sticking point?

13 MS. COBB: They want our engagement letters with
14 Akin Gump. We didn't have a separate engagement letter to
15 do this presentation. Janssen has an engagement letter with
16 its outside counsel, and this fell under that broad
17 engagement letter. The engagement letter, you know, we
18 don't think is relevant at all, and I think courts, you
19 know, in the First Circuit don't think that engagement
20 letters are relevant, but it's beyond just Akin Gump,
21 they're requesting files from outside counsel stored in
22 outside counsel's offices, not stored at Janssen.

23 They're requesting that we go to any outside
24 counsel we used over the last 25 years and search their
25 files for responsive documents, which will all be

1 privileged, of course, but -- and then put them on the
2 privilege log, but your order only required to us do three
3 legal custodians, and so to have to go through this
4 burdensome process of going to any outside counsel we've
5 used, Janssen is a huge company, they've used many outside
6 counsel over the last 25 years with respect to this.

7 THE COURT: Okay. Let me hear relator's response.

8 MR. PRESTON: Your Honor, again, they've never
9 disclosed who the outside counsel who provided relevant
10 legal advice concerning the lawfulness of these services.
11 If they've used 30 different law firms, which I find hard to
12 believe. I think that's, you know, just a lot of bluster,
13 then they've got to identify who those law firms were, and
14 they have an obligation under the Federal Rules to produce
15 documents in the possession of its outside counsel.

16 They can't just store documents at their outside
17 counsel and then not have to produce them. I think
18 there's --

19 THE COURT: So you're asking for nonprivileged
20 documents in the possession of outside counsel, and you
21 think they haven't done a request or searched for those?

22 MR. PRESTON: They haven't. They acknowledged that
23 they haven't, and we're not asking for work product, we're
24 not asking for Covington & Burling work product in this
25 action, but if Covington & Burling possesses evidentiary

1 documents, they're obligated to produce those.

2 THE COURT: Let me stop you right there. What
3 about that, Ms. Cobb?

4 MS. COBB: So we did go to an outside counsel's
5 office in New Jersey. I think we've explained this a number
6 of times with respect to the government investigation that
7 took place in 2003, and we produced all of the documents
8 that were produced to the government.

9 Those were stored at an outside counsel's office,
10 and we did have to go collect those, but I don't understand
11 Mr. Preston and Mr. Leopold think we're just storing
12 documents at outside counsel's offices. I don't know that
13 to be the case. I don't know why we would do that. I think
14 we have produced everything that Janssen has and we're not
15 hiding documents at outside counsel's offices.

16 I don't really understand the need to go and, you
17 know, if there's nonprivileged information stored at an
18 outside counsel's office, what's likely produced in this
19 matter, but I would probably think that most of anything
20 stored at outside counsel is going to be privileged
21 information, and it's going to be another burden on Janssen
22 to start logging privileged communications with outside
23 lawyers, and there could be tons of them.

24 MR. PRESTON: Your Honor, to start with, they
25 should disclose which outside counsel they retained to

1 review the lawfulness of these services. A minute ago we
2 were hearing that there could be numerous outside counsel,
3 and now we're hearing there was just two, but clearly
4 there's never been --

5 MS. COBB: That's not what I said.

6 MR. PRESTON: An investigation hasn't been
7 undertaken to actually determine how many outside counsel
8 provided legal advice concerning the lawfulness of these
9 services.

10 MS. COBB: Again, we're not asserting an advice of
11 counsel defense, so I find this information to not be
12 relevant. If we were asserting an advice of counsel
13 defense, perhaps we would have to go and gather up all of
14 the advice that might be stored at an outside counsel's
15 office, but we are not asserting an advice of counsel
16 defense, so the advice we got from outside counsel about the
17 legality or illegality or whatever documents are stored at
18 outside counsel's office is not relevant to this issue.

19 THE COURT: So when you said earlier, Ms. Cobb,
20 that you did at the beginning of the government's
21 investigation go to a counsel's office in New Jersey and you
22 got a bunch of documents, what were those?

23 MS. COBB: Those were the documents that were
24 produced to the government in the previous investigation, so
25 it wasn't privileged information, that was information that

1 was produced to the government in an investigation into
2 Remicade marketing practices between 2003 and 2011, we
3 produced the documents that were produced to the government
4 that were responsive to this action.

5 MR. POSNER: Just so we're clear, your Honor,
6 United States obviously investigated the underlying conduct
7 in connection with this qui tam. We are talking about
8 something very different here. The evidence in this case
9 shows that the U.S. Attorney's Office in New Jersey together
10 with Main Justice and its investigative partners at HHS
11 reviewed the same conduct at issue, the same slide decks
12 starting in 2003 and ending in 2011.

13 I mean, obviously, that's going to be the subject
14 of, you know, any number of motions and defenses, but we
15 went back to New Jersey's counsel to find, okay, what was
16 produced, what did DOJ look at. That's how we know they
17 looked at the very same conduct that the relator is now
18 challenging, so that's what we produced for New Jersey
19 counsel, but I want to be clear about what that evidence
20 shows.

21 MR. PRESTON: Your Honor, I would just like to
22 address that because I think it's important that, first of
23 all, what Mr. Posner said is inaccurate. Janssen did not
24 make full disclosure of the services that they provided and
25 the value of those services, and, in fact, the information

1 that was disclosed to the government very early on was at
2 the beginning stages of the kickback scheme that's alleged,
3 and the services that were provided later were much more
4 sophisticated, but I think what's important also is Janssen
5 did not produce all of the documents that it produced to the
6 government in connection with that earlier investigation.

7 It's selectively chosen some documents to provide
8 to us, so it's also false for Mr. Posner to say that they
9 have given us all the documents they provided to the
10 government back in 2003, but I think what we're more
11 concerned about with this issue is we don't know the other
12 law firms that Janssen retained to obtain legal advice
13 regarding these services. Maybe there weren't any.

14 It sounds like there were several because they're
15 arguing that it would be burdensome for them to have to go
16 and see if they possess relevant documents, but at a
17 starting point, they have to disclose which law firms
18 Janssen retained to review the legality of these services
19 and the categories of documents that those law firms
20 possess. We're entitled to that information.

21 MS. COBB: So, your Honor --

22 THE COURT: So, if you're raising an advice of
23 counsel defense, why do you need to know with whom they
24 consulted?

25 MR. PRESTON: Your Honor, because they also at the

1 same time they're asserting an advice of counsel defense,
2 they're asserting that they had a good faith belief that
3 their conduct was lawful.

4 THE COURT: So I think as we addressed earlier
5 here, I think it's premature for you now to be collecting
6 that information. If you want to tee it up for Chief
7 Judge Saylor to decide whether you're going -- they've
8 waived their -- they waived their privilege by raising their
9 good faith defense, I think this is a little bit of the cart
10 before the horse to have them disclosing to you all the
11 lawyers they consulted with.

12 I am very interested in whether there are outside
13 counsel who are in possession of discoverable documents and
14 whether Janssen has reasonably tried to find those or made
15 any effort. I mean, the fact that this one counsel in
16 New Jersey had a bunch of discoverable documents --

17 MS. COBB: Your Honor, that was a very unique
18 situation, and the reason it was unique is because they had
19 to produce documents in paper back then in 2003, 2004, 2005,
20 and Janssen didn't get a copy of the production, like they
21 didn't get the boxes and boxes and boxes and boxes that were
22 sent to DOJ, so the only person that had the paper
23 production was -- it actually even it wasn't outside
24 counsel's office, it was their storage facility because they
25 no longer kept it in their office and they were moving and

1 said we are going to destroy all these documents if you
2 don't come get them, so to make sure that no documents were
3 destroyed, we went and got all of the documents, like 300
4 boxes of documents that were produced, so it was a very
5 unique situation. That situation was very different than I
6 think what we're talking about here.

7 THE COURT: Okay.

8 MR. LEOPOLD: Your Honor, we do have a little bit
9 of a different issue with Akin because they potentially in
10 addition to providing legal advice to Janssen about the
11 appropriateness of the programs, specifically they did
12 training at doctor's offices, so a little bit different, and
13 I think --

14 THE COURT: What are you missing about those
15 trainings?

16 MR. LEOPOLD: I'm sorry.

17 MS. COBB: Your Honor, they didn't provide any
18 trainings at doctor's offices, they gave a teleconference
19 about Medicare rules, it was open to anyone, and it was just
20 about legislative actions.

21 THE COURT: Sure. So I think, I read the brochure
22 about that, that was I think one of the exhibits, and what
23 else do you need to know about that, Mr. Leopold?

24 MR. LEOPOLD: Well, we would like as part of the
25 scope and production, I think we're entitled to the

1 materials that were provided by Janssen, letters about the
2 program, whatever they may have provided that would not be
3 privileged, not legal issues, but if they hired a law firm
4 to do work within this program to outside doctors' offices,
5 technicians, whatever controllers of the offices for the
6 doctors, et cetera, all of that correspondence, e-mails,
7 letters, program materials, et cetera should be produced.
8 That's clearly not privileged.

9 THE COURT: And you mean the e-mails, letters,
10 et cetera between Akin Gump and the nonprivileged people
11 they were communicating with?

12 MR. LEOPOLD: At Janssen, yes, your Honor.

13 THE COURT: So, Ms. Cobb, I know you've given them
14 the brochure that explains what Akin Gump was communicating
15 to the people in the doctors' offices. Any other
16 information about that that hasn't been turned over?

17 MR. PRESTON: Your Honor, the key information --

18 THE COURT: Just a minute. I'm going to let
19 Ms. Cobb answer, then you can talk, Mr. Preston. Go ahead.

20 MS. COBB: Akin Gump didn't disseminate the
21 information, like the invitation to the doctors' offices.
22 That was done by the ABSs and the salespeople, so Akin Gump
23 was never communicating with any doctors' offices about the
24 presentation, like the invitation, none of that. So
25 anything else that happened in, you know, within Janssen,

1 you know, that's arguably privileged. I haven't reviewed
2 the communications myself, so I'm not sure if we made
3 privileged calls on those, but they were not communicating
4 outside Janssen, that was left to the salespeople and the
5 ABSs to disseminate the brochures and the program
6 information.

7 THE COURT: Okay. Yes, now go, Mr. Preston.

8 MR. PRESTON: I'm sorry about that, your Honor.

9 THE COURT: That's okay.

10 MR. PRESTON: Your Honor, I think what is missing,
11 if they have an engagement agreement with Akin Gump that
12 apparently not only relates to legal advice provided to the
13 Court but also these consulting services they were paying
14 Akin Gump, then they can redact the portion that related to
15 any legal advice, but I think what's important with those
16 contracts and other documents is the fees that were paid to
17 Akin Gump because it shows the value of these services that
18 Akin Gump provided to doctors' offices free of charge.

19 And only select doctors offices were invited to
20 these conferences that provided some sophisticated
21 information, otherwise you wouldn't have Akin Gump being the
22 presenter, so I think it's not just the contracts that set
23 forth the purpose of providing these services but also any
24 documents that show the fees that Janssen paid Akin Gump to
25 provide these consulting services to their select customers.

1 THE COURT: Okay. Anything to say about that,
2 Ms. Cobb?

3 MS. COBB: I don't know that a contract or an
4 engagement letter would show how much they're paying Akin to
5 do this. You know, they're not asking for legal invoices I
6 would think like related to this, but an engagement letter
7 with Akin Gump wouldn't necessarily elucidate how much
8 Janssen paid for the services that were in connection with
9 this presentation. There's, you know, an engagement letter
10 is not going to show that.

11 THE COURT: Okay. Perhaps I'll just order you to
12 provide whatever documentation you have about how much you
13 paid Akin Gump to educate the people on the ground.

14 MS. COBB: Understood, and, you know, I'm imagining
15 a scenario where there's, you know, monthly invoices that we
16 sent to Akin Gump. Pursuant to Mr. Preston's suggestion, I
17 think we would redact any legal services or any fees paid
18 for legal services, it would just be to the extent it's
19 separated that way. We can redact anything that's not
20 specifically related to these programs.

21 THE COURT: So I do think whatever time the law
22 firm spent just doing the teleconference is relevant but
23 also getting ready for it would also be included.

24 MS. COBB: I understand.

25 THE COURT: So let's try to, I'd like to wrap this

1 up. Is there any other issues that we've missed?

2 MR. PRESTON: Your Honor, I think there's a major
3 issue, there's the extended period that your Honor granted
4 back in February was the period of February 2016 to
5 February 2020, and Janssen is refusing to identify the
6 individuals who had significant involvement during that
7 period related to the specific relevant facets of the
8 alleged kickback scheme that Judge Saylor identified, which
9 is, you know, who were the individuals involved in deciding
10 to stop providing these services.

11 THE COURT: So if I can just say, I understand this
12 issue and thanks for raising it. I had forgotten about it,
13 but, sure, it just seems to me like the parties are talking
14 past themselves, so Judge Saylor says documents created
15 between February 2016 and February 2020 that concern the
16 termination or phase out of the specific practices or
17 programs. So I don't understand what is it about that
18 that's a problem?

19 MS. COBB: Your Honor.

20 THE COURT: Yes, go ahead.

21 MS. COBB: We've agreed to provide them with -- you
22 know, we don't think this relates to significant involvement
23 at all, we think this is a very discrete issue. We need to
24 provide them documents related to the termination or
25 phase-out of the practices. We think this is separate from

1 whatever significant involvement in the development, review
2 of the programs. They're entitled to documents about the
3 termination or phase-out which necessarily might be PRC
4 documents, and we've already told relator what we're going
5 to do to search for those documents, and it seems like
6 they're trying to just conflate the two issues that they can
7 have discovery essentially through 2020 that Judge Saylor
8 said they were only entitled to 2016 generally, that by
9 saying we need to identify all these custodian, potential
10 custodians from 2016 to 2020 sort of eviscerate his order
11 that was very specifically limited to two category of
12 documents.

13 MR. PRESTON: Your Honor, those are the types of
14 witnesses we want to speak to and depose, and if an
15 individual who may have had responsibility for these
16 programs in 2018, it was limited to that period, they've got
17 to disclose it, and that may be someone who we select as a
18 custodian and someone who we want to depose, and their
19 documents obviously would have to be produced.

20 They can't withhold the identities of witnesses
21 from this 2016 to 2020 period.

22 THE COURT: So I do think Judge Saylor's order says
23 to the extent that my order generally expanded the range of
24 dates of documents, and then he goes on to talk about
25 documents, and I don't know that he was really thinking

1 about the fact that the documents may point to witnesses,
2 and I don't know why the documents would be relevant, but
3 the witness who could explain them or further talk about
4 what the documents mean is thereby excluded, so that's going
5 to be my view.

6 Obviously, you know very well how to appeal, so you
7 can appeal it, so it just doesn't make sense to me that
8 Judge Saylor would want relator to have documents pertaining
9 to the termination or phase-out of any of the programs and
10 he even more limited it, it's only programs that relator
11 participated in or personally observed or the potential
12 legality or illegality but he is somehow cutting them off
13 from witnesses on those subjects, so I just think -- I don't
14 know, I agree with you, it's open to interpretation, but I
15 don't -- I just think it doesn't make sense to limit the
16 witnesses.

17 MS. COBB: Your Honor, that's fine, but I think it
18 needs to be clear that if we identify witnesses, it's about
19 the termination only, and then they're entitled to documents
20 about the termination only. They're not entitled to get,
21 run all of the search terms on those custodial files to the
22 extent there's relevant, you know, it's only relevant for
23 the termination of those programs.

24 MR. PRESTON: It's not just the termination though.

25 MR. LEOPOLD: If it's relevant to the issues in the

1 case, it's relevant.

2 MR. PRESTON: It's the lawfulness. Judge Saylor
3 was broader just the decision to terminate or phases out a
4 program, it was also their assessment of the lawfulness of a
5 program, so it's broader than just that.

6 THE COURT: Okay. So I hear you and I'll consider
7 this and I just want to say it's very, very well briefed,
8 and I really appreciate that. Okay.

9 MR. LEOPOLD: One other just housekeeping, more of
10 a housekeeping issue, I'm sure I speak for everybody, I
11 greatly appreciate your time in all of this. I think it
12 would be important, as you can see from the papers of
13 Janssen in this matter; many areas, they say quote, "We're
14 still looking for documents," et cetera.

15 I appreciate that, but these are orders that are
16 months and months and months, if not over a year long. I
17 would ask the Court to please put specific time frames on
18 there, and if the defendant needs additional time, they can
19 contact us, but at least we have a court-ordered deadline
20 when they have to produce documents or else it just keeps,
21 they just say we're looking for documents. Well, that's
22 great, but when? We need a cutoff date.

23 THE COURT: Okay. All right. I will consider that
24 in the context of the specific things they had that very
25 helpful chart showing what's still outstanding and what

1 they're working on.

2 MS. COBB: Your Honor, just so you know, in our
3 filing on Friday, we produced everything that we said we
4 were ordered to produce. There were two outstanding issues,
5 the Akin Gump engagement letter and the DOJ communications,
6 but other than that, everything has been produced, so we've
7 worked really hard since the order came down in September.

8 As I said, earlier we've made productions on the
9 average of every two weeks, so to say we're doing this as
10 quickly as possible. I understand it will never be as
11 efficient as Mr. Leopold and Mr. Preston would like it, but
12 this is how it goes when you have this many documents over
13 this many years.

14 THE COURT: Okay. So I think that's all. Anything
15 else anyone?

16 MR. PRESTON: Thank you for your time, your Honor.

17 THE COURT: Thank you all very much and great to
18 see you again. Thanks a lot.

19 MR. LEOPOLD: Thank you for your time.

20 MS. COBB: Thank you very much, your Honor.

21 MR. PRESTON: Thank you for your time, your Honor.

22 (Whereupon, the hearing was adjourned at
23 12:47 p.m.)

24

25

1 C E R T I F I C A T E
23 UNITED STATES DISTRICT COURT)
4 DISTRICT OF MASSACHUSETTS) ss.
5 CITY OF BOSTON)6 I do hereby certify that the foregoing transcript,
7 Pages 1 through 65 inclusive, was transcribed by me
8 stenographically at the time and place aforesaid in Civil
9 Action No. 16-12182-FDS, THE UNITED STATES OF AMERICA ex rel.
10 JULIE LONG vs. JANSSEN BIOTECH, INC., and thereafter by me
11 reduced to typewriting and is a true and accurate record of the
12 proceedings.

13 Dated January 255, 2023.

14 s/s Valerie A. O'Hara

15 VALERIE A. O'HARA
16 OFFICIAL COURT REPORTER
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